
U.S. Department of Labor
Office of Administrative Law Judges
1111 20th Street, N.W.
Washington, D.C. 20036

Case No. 89-ERA-36

In the Matter of

SYED H. A. HASAN
Complainant

v.

SYSTEM ENERGY RESOURCES, INC.
Respondent

BEFORE: STUART A. LEVIN
Administrative Law Judge

ORDER DENYING MOTION FOR DEFAULT JUDGMENT

Complainant in the above-captioned matter has moved, *inter alia*, for default Judgment on the ground that Respondent allegedly failed to produce documents responsive to a subpoena duces tecum issued June 15, 1989. (*See*, Motion filed July 6, 1989, *See also*, Complainant's Post hearing Brief, page 8-9, 11)[1] The subpoena sought, among other items, production of all documents tendered by Respondent to the U.S. Department of Labor, Wage and Hour Division during the course of its preliminary investigation into the merits of discrimination charges filed by Complainant under the Energy Reorganization Act, as amended, (ERA). (42 U.S.C. §5851; 29 CFR §24.4).

On June 22, 1989, Respondent agreed to Supply, by July 1, 1989, documents responsive to the subpoena. On July 3, 1989, Complainant received document. from the U.S. Department of Labor in response to a Freedom of Information Act (FOIA) request. This FOIA response led Complainant to the conclusion that Respondent had not, in response to the subpoena, been forthcoming with all of the documents it had previously supplied to the Wage and Hour Division.

On July 4, 1989, Complainant advised Respondent that unless all responsive documents were tendered, Complainant would seek a default judgment. On July 6, 1989, Complainant filed the motion now before me.

I have carefully considered Complainant's motion and the context in which it arises. Proceedings under the

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ERA are expedited in the interest of protecting a worker who often is unemployed following an unlawful termination. The regulations implementing the ERA, therefore, provide that the Secretary of Labor shall issue a final order within 90 days after receipt of a complaint. 29 CFR §24.6(b). If at all possible then, administrative actions, including discovery and formal evidentiary hearings, must be completed well within the 90-day deadline. 29 CFR §§24.4(d)(1), 24.5(a), 24.6(a)). Consequently, the time constraints in an ERA proceeding may, in some instances, require adaptations in the general procedural rules set forth at 29 CFR Part 18. (*See*, 29 CFR §18.1).

Since the time deadlines imposed in proceedings of this type are intended to protect the employee, the employee may seek to waive them in his own interest. Such waivers and continuances are customarily sought by Complainant's, and are routinely granted, to permit orderly and complete discovery, and to afford Complainants adequate time to prepare fully for the adjudication. In this instance, however, Complainant indicated he wee prepared to proceed and vigorously opposed any continuance of the proceeding. (Tr. 8, 11-13, 18-29, June 22, 1989). As such, evidentiary hearings were conducted in compliance with 29 CFR Part 24 on June 22, 23, and July 6, 1989.[2]

Complainant continued to pursue pretrial-type discovery, however, including a request for documents outside the scope of his subpoena (Tr. 144, June 23, 1989), simultaneously with the commencement of evidentiary hearings on the merits of his complaint. As a consequence, in considering his request for sanctions, it would not seem inappropriate to balance Complainant' a entirely proper insistence on rather strict adherence to applicable time deadlines, with the need for hasty discovery and document searches occasioned by his trial strategy. (*See*, Tr. 40-42, 47-48, July 6, l989).

Upon consideration of the record, I believe the circumstance render further sanctions unwarranted in this matter. Contrary to Complainant's assertions, the record does not support the contention that Respondent acted in bad faith or willfully failed to provide a complete response to Complainant's subpoena.

Respondent's subpoena return varies from the Department of Labor response to Complainant's FOIA request, in part, because Respondent had inadequate time to explore the circumstances under which the Department obtained its information. At the hearing on July 6, 1989, Respondent was directed to determine the reason for the differences in the two responses, and to submit any additional relevant documents that its initial search

may have overlooked. (Tr. 70-71, July 6, 1989). The hearing record wee further held open

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[Page 3]

until July 10, 1989, for Complainant to offer into evidence documents he received in response to a subpoena, the documents he obtained from the Department of Labor, and which he attached as Appendix B to his Motion for Default Judgment, and/or any additional documents which may have been overlooked and furnished by Respondent poet hearing.

By letter dated July 10, 1989, Respondent, after review of its subpoena return, contended that it substantially complied with Complainant's document request. Respondent explained that during the course of the preliminary investigation, the Wage and Hour Division sent an investigator to Respondent's offices. The investigator interviewed and took statements from a number of employees, and obtained copies of documents directly from several of the employees she interviewed. The Wage and Hour Division file was, therefore, compiled from Respondent's employees who provided documents at various times, and not all of the employees retained copies or were able to locate copies of the documents they provided. It appears, therefore, that absent time to retrace the investigator's steps, a more complete response to Complainant's inquiry would not have been feasible. I find, under these circumstances, that Respondent was neither acting in bad faith nor in willful disregard of Complainant' B subpoena when its return failed to duplicate the Wage and Hour Division FOIA response. (*See, Kropp v. Zeibarth*, 557 F.2d 142 (8th Cir., 1977)).

It should also be noted that Complainant was afforded every opportunity to offer into evidence documents he received from the Wage and Hour Division. Yet, Complainant has declined to offer, as evidence in the hearing record, any of the documents obtained under the FOIA. (See, Motion for Default Judgment, Appendix B.; Tr. 267-271, July 6, 1989).

For example, interview statements were prepared by the Wage and Hour Division investigator. Respondent provided copies of the statements in ETA possession but not all such statements were necessarily provided to it by the employees interviewed. One such statement, not included in Respondent' B return, but which Complainant obtained via the FOIA request, wee provided by Fred Titus, Director of Nuclear Plant Engineering. Since the statement was not returned by Respondent, Complainant seeks an adverse inference that Mr. Titus had animus towards Mr. Hasan hen he made the decision to remove Mr. Hasan from the Grand Gulf facility due to Mr. Hasan's contact with the NRC which resulted in two NRC audits." (*See*, letter dated July 11, 1989; *See also*, Complainant's Post hearing brief at 9). Mr. Titus' entire statement, however, was in Complainant's possession and was annexed to Complainant's Motion, yet Complainant, having obtained it from another source, seeks an adverse inference

[Page 4]

rather than offering the document into evidence.[3]

In addition, Respondent provided the employment contracts (DCA'a) Complainant sought to inspect, and was simply unable to locate the DCA for J. Shah. Thus, in his letter dated July 11, 1989, Complainant listed eighteen employees for whom DCA's had allegedly not been furnished. Eleven of the eighteen employees were listed in RX 6, a document initially excluded from the record pursuant to Complainant's objection at the June 23, 1989, hearing pending further discovery and submission of the underlying DCA's. (Tr.5356, June 23, 1989). At July 6, 1989, hearing, and subsequent to Respondent's subpoena return, RX 6 was offered into evidence by Respondent and was received without objection by Complainant. (*See*, Tr. 31, 158, July 6, 1989). Complainant's denial to the contrary notwithstanding these circumstances tend to substantiate Respondent's contention, that it supplied, on July 1, 1989, seventeen of the eighteen DCA's subpoenaed by Complainant.

Furthermore, in respect to other areas in which Complainant sought to pursue pretrial-type discovery, it may be noted that the hearing record contains definitions of "seconded employees," aand information on the size and scope of the Bladder and platform" project provided in testimony by Complainant and other witnesses at the hearing. Again, any information in respect to these subjects which may have been contained in the FOIA response was available for Complainant's use in examining witnesses including Complainant's supervisor who was available to be recalled on July 6, 1989. In addition, this information could have been but was not offered into evidence by Complainant. (*See* Motion at page at Tr. 259-65, July 6, 1989).

Conclusion

Once formal hearings commence in these types of expedited proceedings, there is little time for pretrial-type discovery in search of potentially relevant documents which might lead to potentially relevant evidence. In this instance, Complainant eschewed his opportunity for pretrial discovery, and indeed sought the immediate commencement of the hearing on June 22, 1989, (Tr. 17-19, June 22, 1989), even before he had received either a return on his subpoena or the Department's response to his FOIA request. (*See*, Tr. 17-18, 28-31, July 6, 1989).

Nevertheless, during the course of the hearing, Respondent was precluded from entering certain documents into evidence before completing its subpoena return. At the time, then, an effective sanction was imposed for

[Page 5]

failing a proper subpoena return. Respondent's evidence was excluded until specific documents were produced. Respondent, in turn, substantially complied with Complainant's document demands. Moreover, it did so under severe time constraints which tend to mitigate any residual shortcomings which led to differences between the FOIA response and the subpoena return. As such, no additional sanctions are now appropriate. (Tr. 121-27, 237-40, June 22, 1989: Tr. 53-56, 147, June 23, 1989).

Under these circumstances, the entry of a default judgment or the sanction of invoking adverse inferences would be unduly harsh and unwarranted. For all of the foregoing reasons, then, I conclude that Complainant's Motion should be denied.

ORDER

IT IS ORDERED that Complainant's Motion for Default Judgment be, and it hereby is, DENIED.

STUART A. LEVIN
Administrative Law Judge

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JUL 27 1989

[ENDNOTES]

[1]Respondent by letter dated June 20, 1989, submitted, by Federal Express, a Motion to Quash the subpoena. Reapondent's motion, however, wee addressed to Judge Richard Avery at his New Orleans, Louisiana office, end did not reach me in Washington, D.C. until July 11, 1989. The motion was superseded, however, by agreements reached at the hearings on June 22, 1989 and July 6, 1989, and, for all of the reasons herein noted, I find that Respondent has substantially complied with the subpoena thus rendering the motion to quash now moot.

[2]Complainant's request for a hearing was filed on June 13, 1989.

[3]Although Mr. Titus' role in the decision not to renew Complainant's contract wee addressee at the hearing on June 23, 1989, Complainant did not seek to subpoena Titus, who resides in Vicksburg, Mississippi, to testify until 4:30 p.m. the afternoon before the hearing was scheduled to reconvene in Washington, D.C., on July 6, 1989. Respondent's motion to quash the subpoena as untimely and not in compliance with 29 CFR Part 18 was, therefore, granted.